No. 43

In the Supreme Court of the United States

OCTOBER TERM, 1956

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

TOM WE SHUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 6–7) is reported at 227 F. 2d 40. The findings of fact and the conclusions of law of the District Court (R. 4) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1955 (R. 7). On January 9, 1956, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including March 10, 1956 (R. 8). The petition was filed

on March 8, 1956, and was granted on April 23, 1956 (R. 8). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Immigration and Nationality Act of 1952 authorizes proceedings other than habeas corpus for judicial review of an order excluding an acknowledged alien from the United States.

STATUTE INVOLVED

Section 236 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 200, 8 U. S. C. (1952 ed.) 1226 (c), provides:

EXCLUSION OF ALIENS

> SEC. 236 * * * (c) Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

The pertinent provisions of Sections 235 (b) and (c), 236, 242 (b), (c) and (e), 291, and 360 (a) of the Immigration and Nationality Act, and Sections 10 and 12 of the Administrative Procedure Act, are set forth in Appendix A, *infra*, pp. 56–65.

STATEMENT

Respondent is an acknowledged alien seeking entry into the United States—as the blood son of an Amer-

ican citizen who served in the United States armed forces during World War II—pursuant to the provisions of the War Brides Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. (1946 ed.) 232 (R. 1). In January 1948 and February 1949, Boards of Special Inquiry held that respondent was inadmissible to the United States on the ground that he had not established that he was the son of an American soldier (R. 1). Their action was affirmed by the Board of Immigration Appeals (R. 1).

Respondent first sought judicial review of the order of exclusion by a declaratory action instituted before the effective date of the Immigration and Nationality Act of 1952. His complaint was considered on the merits and dismissed on the ground that the order was valid. *Tom We Shung* v. *McGrath*, 103 F. Supp. 507 (D. D. C.), affirmed, *Tom We Shung* v. *Brownell*, 207 F. 2d 132 (C. A. D. C.). This Court vacated the judgment and remanded the cause to the District Court with directions to dismiss for lack of jurisdiction on the authority of *Heikkila* v. *Barber*, 345 U. S. 229, which had held that habeas corpus was the only remedy open to an alien ordered deported under the Immigration Act of 1917. 346 U. S. 906.

On December 15, 1953, after the 1952 Act became effective, respondent again sought review of the order of exclusion by a declaratory judgment action filed in the District Court for the District of Columbia, this time on the theory that the right to such review was conferred by the 1952 Act (R. 1–2).

The District Court dismissed the complaint on the ground that it was without jurisdiction to review an order of exclusion in proceedings other than habeas corpus (R. 4–5).

On appeal, the Court of Appeals reversed (R. 6–7) on the authority of *Estevez* v. *Brownell*, 227 F. 2d 38, decided by that court on the same day. In *Estevez*,[1] the Court of Appeals held that, in view of this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, that deportation orders were made subject by the 1952 Act to review under the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. (1952 ed.) 1001, 1009, that remedy is also available under the 1952 Act to review orders excluding aliens from the United States. The Court of Appeals viewed as irrelevant the fact that under Section 360 of the 1952 Act (*infra*, App. A, p. 63) excluded persons claiming citizenship are explicitly relegated to review by habeas corpus alone.

SUMMARY OF ARGUMENT

The court below has ruled that, since *deportation* orders under the Immigration and Nationality Act of 1952 have in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, been held subject to challenge in a review proceeding under Section 10 of the Administrative Procedure Act, *exclusion* orders must likewise now be deemed reviewable by such a proceeding. This holding ignores the fundamental differences between exclusion and deportation and fails to take into account the different

[1] The Court of Appeals decision in *Estevez* is set forth in Appendix B, *infra*, pp. 66–68.

language, statutory structure and legislative history of the 1952 Act with respect to exclusion proceedings, as distinguished from deportation. The result of a consideration of all these factors is that while the ruling in *Heikkila* v. *Barber*, 345 U. S. 229, that under the 1917 Immigration Act deportation orders could be reviewed only by habeas corpus applied *a fortiori* to exclusion (*Tom We Shung* v. *Brownell*, 346 U. S. 906), a change in the law as to deportation, as found in *Pedreiro*, does not mean that the change was carried over to exclusion.

I.

A. The language of the finality clause in the 1952 Act with respect to exclusion is, as it previously was, significantly different from that relating to deportation. Section 236 (c), dealing with exclusion, imposes finality on the decision of the special inquiry officer who conducts the hearing, and then specifically provides for administrative review by the Attorney General. Section 242 (b), dealing with deportation, simply states that the decision of the Attorney General shall be final. Section 236 (c) establishes exceptions even to administrative review within the Department of Justice in certain security and medical cases, while Section 242 (b) contains no exceptions. Hence, the wording of Section 236 (c) (exclusion) is a much clearer indication that full-scale judicial review under Section 10 of the Administrative Procedure Act was not intended than is the language of Section 242 (b) (deportation).

Similar language in previous "finality" clauses has consistently been interpreted to preclude judicial review of exclusion orders except for a very narrow scrutiny in habeas corpus.

B. There are other significant differences in the statutory structure of the 1952 Act with respect to exclusion which indicate there is to be no general judicial review, under the Administrative Procedure Act, of exclusion orders. In exclusion, the burden of proof is on the alien under Section 291 of the Act; in deportation, it is on the Government, except as to the lawfulness of entry. There is, as to exclusion, no specific recognition of the "substantial-evidence" rule, as there is with respect to deportation. Section 235 (c) even denies a hearing to an excluded alien, if the exclusion is based upon confidential information, thus showing a specific purpose that in certain classes of cases there was to be no judicial review of the evidence at all.

The general exclusion provisions must also be read in the light of Section 360 of the 1952 Act which expressly denies the right to judicial review, other than habeas corpus, to citizenship-claimants if the issue of their citizenship arose, or is pending, in an exclusion proceeding. It is in the highest degree unlikely that Congress intended to give greater rights of review to one denied admission to this country who is concededly an alien, such as respondent, than to one who seeks entry under a claim of citizenship. On the other hand, the fact that Congress specifically limited citizenship-claimants seeking entry to review by habeas corpus is itself a clear indication that Con-

gress considered habeas corpus to be the only method of review open to excluded aliens.

C. The statements in the legislative history of the 1952 Act which this Court, in *Pedreiro*, found indicative that Congress intended deportation orders to be generally reviewable under Section 10 of the Administrative Procedure Act relate only to deportation. There are no similar statements as to exclusion. In fact, one of the main reasons offered by Congressman Walter and Senator McCarran, sponsors of the 1952 Act, in opposition to defeated amendments specifically providing for general judicial review of both exclusion and deportation orders, was that such amendments would result in general review of exclusion orders, a right not theretofore recognized. See 98 Cong. Rec. 4416 and 98 Cong. Rec. 5789. Even some opponents of the 1952 Act did not object to habeas corpus remaining the form of judicial review for entrant aliens, although they wanted declaratory review for deportation orders.

II

The statutory differences in the 1952 Act between exclusion and deportation reflect the different constitutional status and historical background of the two types of proceedings.

A. Constitutionally, an alien seeking admission into the United States is in a very different position from that of a resident alien whom the government is seeking to deport. The alien seeking admission has not come within the protection of the Constitution, as has the resident alien. *Shaughnessy* v. *Mezei*, 345 U. S.

206, 212. Although the right to judicial review is not inevitably a part of due process, this Court has recognized that the Administrative Procedure Act reflects a hospitable attitude towards such a right. Hence, as to resident aliens, who in deportation proceedings are entitled to procedural due process, there is reason, when the statutory language is not clear, to interpret it so as to accord the resident alien the right to general judicial review. There is much less reason for this attitude with respect to the entrant alien who does not have the constitutional status of a resident.

B. In exclusion cases involving no claim of citizenship, as here, the area of judicial review has always been extremely limited (see *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543), whereas in deportation proceedings there has been a tendency to broaden the scope of judicial review. E. g., *Vajtauer* v. *Commissioner*, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135, 153–154; see also *Galvan* v. *Press*, 347 U. S. 522. Thus, the holding of *Pedreiro* that Section 10 of the Administrative Procedure Act applies to deportation orders, even if Section 10 (e) of that Act with its standard of "substantial evidence" governs, made no real change in the scope of judicial review of deportation orders, particularly since Section 242 (b) (4) of the 1952 Act provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." As to exclusion, however, there is no equivalent statutory provision. To apply the "substantial evidence" standard of the Administrative Procedure Act to exclusion orders would be a novel departure from Congressional and

judicial policy. The 1952 Act gives no indication that Congress intended such a change. On the contrary, as we have pointed out, it carried over the language of a "finality" clause that had consistently been interpreted to preclude judicial review.

C. None of the practical reasons which favor a hospitable attitude toward declaratory judgment review of deportation orders applies to exclusion cases. The reasoning of this Court in *Pedreiro*, 349 U. S. at 51, that it would not be in keeping with either the Immigration and Nationality Act of 1952 or the Administrative Procedure Act to require a resident alien to interrupt his normal course of life and submit to custody in order to secure judicial review of his deportation order, as he would have to do in a habeas corpus proceeding, does not apply to an alien seeking admission. He has no normal course of life in this country and no already established ties; he is either kept in custody pending final decision on his exclusion order, or released on parole with the knowledge that he cannot establish any orderly manner of living here until his admission is approved. Habeas corpus provides the alien an expeditious and complete remedy, without dislocation of an established course of life, while declaratory judgment actions are subject to all the delays of ordinary civil suits and often drag on for years.

III

Respondent has suggested that, irrespective of the general reviewability of an exclusion order, he is entitled to a declaratory action because he raises a question of "status" of a type which has been held

reviewable in a suit for declaratory judgment (*Perkins* v. *Elg*, 307 U. S. 325; *McGrath* v. *Kristensen*, 340 U. S. 162; *Rasmussen* v. *Brownell*, 350 U. S. 806). This contention must fail for three reasons.

A. This Court's previous dismissal of respondent's declaratory judgment action for lack of jurisdiction (*Tom We Shung* v. *Brownell*, 346 U. S. 906) finally determined, in effect, that a status question of the type reviewable by suit for declaratory relief was not presented by respondent. He is therefore not in a position to make the "status" argument in the present proceeding.

B. Irrespective of the prior adjudication, the issue in respondent's case is not one of status which would independently support an action for declaratory judgment. The *Elg-Kristensen-Rasmussen* line of cases all involved (a) a general issue of citizenship or eligibility to citizenship, and (b) a determination of the legal question of the right of a class as a whole, rather than the factual question of whether the particular individual belonged in fact to that class.

Those two prerequisites for a declaratory action do not exist here. Respondent is not claiming citizenship or eligibility to citizenship; and even if "status" has the larger connotation of the rights of any general class, respondent is not raising such an issue but only the particular factual one of whether he is the blood son of a particular person.

C. In any event, declaratory review is not available, even though a true issue of status may be involved, to persons outside the United States who

have never been admitted to, or resident within, the United States. The Court has long distinguished between the rights of citizenship-claimants within the United States and those outside; the former have been entitled to a judicial determination of their status while the latter have had to be content with an administrative determination. Congress has recognized this distinction in Section 360 of the 1952 Act (*infra*, App. A, p. 63) and has provided that claimants outside the United States must test their right by habeas corpus.

If this is true of status questions presented by claimants to citizenship, it is all the more true of an issue presented by a conceded alien, not admitted to or residing in the United States, which is said to be a "status" question.

ARGUMENT

This case presents the issue of whether an order excluding an acknowledged alien from admission into the United States is now reviewable by the courts in proceedings other than habeas corpus—specifically, whether it is reviewable by an action under Section 10 of the Administrative Procedure Act. The court below was of the view that the ruling in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48—that under the Immigration and Nationality Act of 1952 deportation orders are subject to challenge by declaratory judgment actions—required a similar result as to exclusion orders. It found support for its equation of the two types of orders in the fact that, in respondent's prior proceeding, this Court

cited as authority for the holding that declaratory review of exclusion orders would not lie (346 U. S. 906) its prior decision in *Heikkila* v. *Barber*, 345 U. S. 229, to the effect that deportation orders were, under the 1917 Act, reviewable only by habeas corpus.

But this assimilation of exclusion to deportation ignores the fundamental constitutional and statutory differences which distinguish the two types of orders. It follows that the mere fact that the reasoning used in *Heikkila* as to deportation applied *a fortiori* to an exclusion proceeding under the 1917 Act does not inevitably mean that a change in the law as to deportation in the 1952 Act, as found in *Pedreiro*, automatically carried over to exclusion. Constitutionally, an alien is on entering in a far different position from a resident alien, and that difference is reflected in the variant statutory provisions, including provisions for review, which govern exclusion as distinguished from deportation under the 1952 Act. The ruling of the court below fails to take into account the different language, statutory structure, and legislative history of the 1952 Act, as well as the separate constitutional considerations and historical background applying to exclusion as distinct from deportation proceedings.

I. THE LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 INDICATE THAT THE ONLY JUDICIAL REVIEW OF EXCLUSION ORDERS IS BY HABEAS CORPUS

This Court held in *Heikkila* that Section 10 of the Administrative Procedure Act did not enlarge

the means of judicial review of deportation orders beyond the historical one of habeas corpus because Section 19 of the Immigration Act of 1917, 39 Stat. 874, 889–890,[2] was a statute which precluded judicial review, and was therefore within the exception written into Section 10 of the Administrative Procedure Act. 345 U. S. at 234–235. The Court noted that Section 19, when read against the "background of a quarter of a century of consistent judicial interpretation," precluded "judicial intervention in deportation cases except insofar as it was required by the Constitution." 345 U. S. at 234–235. In *Pedreiro,* the Court found that, in the 1952 Act, Congress had departed from this rule for deportation orders and had permitted judicial review not only in habeas corpus but also by action for declaratory relief. In our view, no comparable purpose to change the rule for exclusion cases can be found in the 1952 Act, and the old rule, as expressed in *Heikkila* and in petitioner's first case in this Court, must therefore continue to govern.

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[2] Section 19 of the Immigration Act of 1917, 39 Stat. 889–890, provided in part:

"In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

A. THE TEXT OF THE "FINALITY" CLAUSE WITH RESPECT TO EXCLUSION INDICATES THAT CONGRESS INTENDED ONLY ADMINISTRATIVE REVIEW OF EXCLUSION ORDERS, APART FROM JUDICIAL REVIEW VIA THE WRIT OF HABEAS CORPUS

The language of the "finality" clause with respect to exclusion is still, as it previously was, significantly different from the finality clause with respect to deportation.[3] Section 236 (c) provides:[4]

> Except as provided in subsections (b) or (d), in every case where an alien is *excluded* from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, *the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.* [Emphasis added.]

On the other hand, Section 242 (b) (*infra*, App. A, pp. 59–61)—relating to deportation—provides in pertinent part:

> In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or

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[3] Even if the wording were similar, such similarity would not necessarily require the same interpretation in a different setting. "The same words, in different settings, may not mean the same thing." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 678; see also *Tutun* v. *United States*, 270 U. S. 568, 578–579; *Towne* v. *Eisner*, 245 U. S. 418, 425.

[4] The finality language used in Section 17 of the 1917 Act, 39 Stat. 887, as to exclusion was also stronger than that of Section 19 as to deportation (see fn. 2), Section 17 providing:

"* * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor. * * *"

> treaty, the decision of the Attorney General shall be final.

Thus, the "finality" clause relating to exclusion, unlike that for deportation, has its own provision for review, an *administrative* review by the Attorney General. The statute imposes finality on decisions made by officials at the lowest level below the Attorney General, and then provides for review, but only for administrative review by the Attorney General. This limitation on the right of review strongly suggests that no other form of review was intended, aside from habeas corpus which can traditionally be brought to test a detention.

Exceptions even to this right of administrative review are made in subsections (b) and (d) of Section 236 (*infra*, App. A, pp. 58–59), referred to and qualifying the administrative appeal provided in Section 236 (c). Subsections (b) and (d) specifically declare that as to temporary exclusion in security cases, and to exclusions for certain medical reasons, there shall be no appeal of any kind. This is further indication that Congress did not contemplate an automatic right of judicial review for all orders of exclusion.

The "finality" clause of Section 236 (c) (relating to exclusion) is thus a much clearer manifestation than is Section 242 (b) (deportation) of the Congressional purpose, so far as possible, to preclude judicial review of exclusion orders. The wording of Section 236 (c) brings exclusion orders within the exception of the first part of Section 10 of the Administrative Procedure Act (*infra*, App. A, p. 63), rendering Section 10 inapplicable to those administra-

tive actions where the statute precludes judicial review (cf. *Heikkila* v. *Barber*, 345 U. S. 229, 232–233). See also *infra*, pp. 35–41.

It was similar language in previous "finality" clauses relating to exclusion which led the courts to the conclusion that judicial scrutiny of exclusion orders was limited to the type of review available in habeas corpus. In *Ekiu* v. *United States*, 142 U. S. 651, 660, a habeas corpus proceeding challenging an exclusion order under the Immigration Act of 1891, 26 Stat. 1084, which had a "finality" clause very much like that of Section 236 (c) of the 1952 Act,[5] the Court said:

> An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Jung Ah Lung*, 124 U. S. 621; *Wan Shing* v. *United States*, 140 U. S. 424; *Lau Ow Bew, Petitioner*, 141 U. S. 583. And Congress may, if it sees fit, as in the statutes in question in *United States* v. *Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those

[5] Section 8 of the Immigration Act of 1891, 26 Stat. 1084, 1085, provided in part: "All decisions made by the inspection officer or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury."

facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted. *Martin* v. *Mott,* 12 Wheat. 19, 31; *Philadelphia & Trenton Railroad* v. *Stimpson,* 14 Pet. 448, 458; *Benson* v. *McMahon,* 127 U. S. 457; *In re Oteiza,* 136 U. S. 330. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray* v. *Hoboken Co.,* 18 How. 272; *Hilton* v. *Merritt,* 110 U. S. 97.

This Court in its *Heikkila* decision, 345 U. S. at 234, noted that in *Ekiu* v. *United States,* 142 U. S. at 663–664, the "finality" clause (*supra,* p. 16, fn. 5) was held to have been "manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise,

save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act." See also (among other cases cited in *Heikkila*) *Lem Moon Sing* v. *United States*, 158 U. S. 538, 549, in which Mr. Justice Harlan observed that, when Congress made the administrative decision final in an exclusion proceeding under the Chinese Exclusion Act, "the authority of the courts to review the decision of the executive officers was taken away." As noted in *Heikkila*, the finality provision involved in *Ekiu* was carried forward in later immigration legislation, and by 1902, Mr. Chief Justice Fuller in *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305, was able to describe as "for many years the recognized and declared policy of the country" the congressional decision to place "the final determination of the right of admission in executive officers, without judicial intervention." 345 U. S. at 234.

While this degree of finality espoused in the early cases was subsequently modified to the extent of recognizing that aliens had the right to question whether executive officers were acting in accordance with law, *Gegiow* v. *Uhl*, 239 U. S. 3, 9, or in manifest abuse of power and discretion, *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 263, this Court has never departed from the general principle that, as to aliens seeking admission, the final authority rests in the executive branch. See *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543. The entry of aliens into this country has always been treated as strictly a question to be determined by the

executive, and of concern to the judiciary only at the level when the right to hold a person in custody is broached, *i. e.*, when habeas corpus is sought. Even more clearly than with respect to deportation have the cases established that exclusion orders are subject only to this most limited form of review (see also *infra*, pp. 35–37, 39–41). The language of finality in Section 236 (c), carried over from similar language in prior acts, reflects this historical position.

B. THE STRUCTURE OF THE 1952 ACT AS A WHOLE CONFIRMS THE CONCLUSION THAT HABEAS CORPUS WAS MEANT TO BE THE SOLE FORM OF JUDICIAL REVIEW FOR THE EXCLUDED ALIEN

As we have just shown, the 1952 Act carried over, as to exclusion, a finality clause which in terms was different from the finality clause relating to deportation, and which, for years had been interpreted as permitting only extremely narrow judicial review. There are other significant differences in the statutory structure with respect to exclusion, as distinguished from deportation, which indicate that there was no purpose to permit general judicial review, under the Administrative Procedure Act, of orders of exclusion.

The basic purpose of the hearing is different in the two types of cases. When an alien is seeking admission to this country, the burden of proof is on him, under the specific provisions of Section 291 of the 1952 Act (*infra*, App. A, p. 62),[*] to establish his

[*] This provision was carried over from Section 23 of the Immigration Act of 1924, 43 Stat. 165–166.

right to admission and the absence of grounds of exclusion. Hence, the hearing before a Special Inquiry Officer or a Board of Special Inquiry is, in effect, an investigation in which the alien is given an opportunity to establish his affirmative claim. In deportation, on the other hand, where the alien is in this country, the burden of proof which he has under Section 291 is merely to prove his lawful entry. The government has the burden of showing that he is of the class which Congress has decided to expel. The government institutes the hearing on the basis of specific charges.

Again, as to deportation there is in the statute a specific recognition of the "substantial evidence" standard. Section 242 (b) (4) (*infra,* App. A, pp. 59–61) provides that no decision of deportability shall be valid unless based upon reasonable, substantial, and probative evidence. No similar provision appears in Sections 235 and 236 (*infra,* App. A, pp. 56–59), dealing with exclusion, where, as noted, the burden of proof is on the alien. In fact, Section 235 (c) explicitly authorizes denial of a hearing to an excluded alien on confidential information (see *Jay* v. *Boyd,* 351 U. S. 345), thus showing a specific intent that in those cases there be no judicial review at all of the evidence. Another difference is that Sections 242 (c) and (e) (*infra,* App. A, p. 61), relating to deportation, contain references to "judicial review,"

whereas Sections 235 and 236, dealing with exclusion, do not.[6]

The statutory provisions for exclusion must also be read in the light of Section 360 of the 1952 Act (*infra*, App. A, p. 63) dealing with claims of citizenship. Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, had permitted institution of declaratory judgment actions by any one who had been denied a right or privilege as a national of the United States upon the ground that he was not an American national, but Section 360 permits such declaratory actions only by one denied such a right *who is already within the United States*. Under Section 360, where the issue of citizenship arises in an exclusion proceeding, it is first to be considered administratively, as in the case of any alien seeking admission, and a determination rejecting the claim is "subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." No other judicial remedy is available. *Lew Hsiang* v. *Brownell*, C. A. 7, No. 11594, decided June 19, 1956.

The court below, in its companion decision in *Estevez* v. *Brownell*, 227 F. 2d 38, 39, thought that the limitation in Section 360 of the opportunities for

[6] In *Rubinstein* v. *Brownell*, 206 F. 2d 449, 452-453, affirmed by an equally divided court, 346 U. S. 929, the court below stressed these provisions of Sections 242 (c) and (e) in holding that *deportation* orders are reviewable in actions for declaratory relief.

judicial review available to arrivals claiming citizenship had no relevance to the problem of this case relating to the kind of review open to entrant aliens (*infra*, App. B, pp. 67–68). This is an unreasonable interpretation. It is in the highest degree unlikely that Congress decided to give to one concededly an alien, seeking admission, a greater right of review than was made available to persons claiming American citizenship. As the Court cautioned in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59, "* * * statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." The fact that Congress specifically provided only for habeas corpus review with respect to *citizens* seeking admission is in itself a clear indication that Congress considered habeas corpus the only method of review open to excluded *aliens*.

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[7] Cf. *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709, 711–712 (D. D. C.); which held that citizenship claimants outside the United States may still, under the 1952 Act, bring a declaratory judgment action under the general declaratory judgment act, 28 U. S. C. 2201. This case is contrary to an earlier decision in the same district, *D'Argento* v. *Dulles*, 113 F. Supp. 933, 935–936 (D. D. C.), and also to the decision reached in *Correia* v. *Dulles*, 129 F. Supp. 533, 534 (D. R. I.), as well as to the recent Seventh Circuit case of *Lee Hsiang* v. *Brownell*, decided June 19, 1956. See also language in *Vasquez* v. *Brownell*, 113 F. Supp. 722, 725 (W. D. Tex.); *Avina* v. *Brownell*, 112 F. Supp. 45, 18–19 (S. D. Tex.); and *Ng Gwong Dung* v. *Brownell*, 112 F. Supp. 673, 674 (S. D. N. Y.), which indicate a contrary view to that expressed in *Ngow* v. *Dulles* that an entrant alien claiming citizenship may proceed under the general declaratory judgment act in spite of Section 360 of the 1952 Act. The *Ngow* decision itself suggests, 122 F. Supp. at 713, that the judicial review available to an excluded *alien* is by way of a writ of habeas corpus.

Respondent urges that all these indications of the legislative purpose are nullified by Section 12 of the Administrative Procedure Act which provides (*infra*, App. A, p. 65) that "no subsequent legislation shall be held to supersede or modify the provisions of this [Procedure] Act except to the extent that such legislation shall do so expressly" (see Br. in Opp. pp. 5–6). One difficulty with this argument is, (as we have already pointed out (*supra*, pp. 15–16)), that Section 10 of the Procedure Act itself embodies a built-in excepting clause—"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion" (see *infra*, App. A, p. 63)—so that a subsequent statute precluding judicial review or committing agency action to agency discretion (as is true here) would automatically fulfill the requirement of Section 12. See *Heikkila* v. *Barber*, 345 U. S. 229, 232–235. Another defect in respondent's contention is that it assumes that Congress must "employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act" (*Marcello* v. *Bonds*, 349 U. S. 302, 310); when the finality terms of Section 236 (c) are read in the light of their history and of the structure of the 1952 Act, they must be held expressly to supersede the general review provisions of Section 10 of the Procedure Act. *Pedreiro* ruled that the 1952 Act's *deportation* provisions did not accomplish such supersedure but, as we point out elsewhere in this brief (*supra*, pp. 14–22 and *infra*, pp. 35 *ff*), the terms of the pertinent finality provisions and the histories of the two processes differ

significantly; moreover, the practical considerations—particularly, the dislocation in the life of the *resident* alien which would be caused by a requirement that he surrender himself to custody before seeking court review—which moved this Court in *Pedreiro* (see 349 U. S. at 51) do not exist with respect to exclusion (see *infra*, pp. 42–44).

C. THE LEGISLATIVE HISTORY OF THE 1952 ACT ALSO SHOWS THAT HABEAS CORPUS WAS INTENDED TO BE THE EXCLUSIVE FORM OF JUDICIAL REVIEW FOR THE EXCLUDED ALIEN

The legislative history of the 1952 Act strongly supports the conclusion that habeas corpus was intended to be the only form of review of exclusion orders. While, as this Court noted in *Shaughnessy* v. *Pedreiro*, 349 U. S. at p. 52, there were statements by the sponsors of the 1952 Act which can be read as indicating that they thought judicial review of *deportation* orders was available under Section 10 of the Administrative Procedure Act, there are no equivalent remarks as to review of exclusion orders. On the contrary, the history shows that the sponsors recognized the difference in constitutional position of entering aliens from those resident here (see *infra*, pp. 35 *ff*) and were careful not to extend the power of judicial review over exclusion orders.

1. The genesis of the 1952 Act was in a Senate resolution to make an investigation of the immigration system which was passed by the 80th Congress

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* If Section 10 of the Procedure Act plays any role at all in the judicial review of exclusion orders, it would seem that Section 10 (b) (*infra*, App. A, pp. 63–64) would make the "applicable form of legal action" the writ of habeas corpus.

(S. Res. 137, 80th Cong., 1st Sess.). Pursuant to this resolution, an extensive Congressional study of preexisting immigration laws and their operation was conducted. Its results are contained in Senate Report 1515, 81st Cong., 2d Sess., entitled *The Immigration and Naturalization Systems of the United States*. In summarizing the prior law as to the judicial review available for deportation orders, the Report stated at page 629 that: "* * * Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service * * *." This statement anticipated this Court's decisions in *Heikkila* v. *Barber*, 345 U. S. 229, as to deportation, and in *Tom We Shung* v. *Brownell*, 346 U. S. 906, as to exclusion.

Following issuance of Senate Report 1515, three bills were introduced, all of which contained a Section 106, providing that determinations of fact and exercises of discretion by administrative officers should not be subject to review by any court, and, further, that determinations of law by administrative officers should not be subject to review by any court except through the writ of habeas corpus. S. 3455 (81st Cong., 2d Sess.); S. 716 and H. R. 2379 (82d Cong., 1st Sess.). The latter provision was in accord with existing law, but the limitation on review of determinations of fact and exercises of discretion would have restricted drastically the scope of judicial review by habeas corpus of orders of immigration officials, particularly in regard to deportation. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, and *Carlson* v. *Landon*, 342 U. S. 524.

Section 106 was the subject of much criticism at the joint hearings conducted before subcommittees of the Committees on the Judiciary on S. 716 and H. R. 2379, held in March and April of 1951 (see *e. g.* Joint Hearings Before the Subcommittees of the Committees on the Judiciary, Congress of the United States, March and April 1951, Eighty-Second Congress, First Session on S. 716, H. R. 2379, and H. R. 2816, pp. 136–141, 345–351, 417–422, 526–535, 591).[9] One of its strongest opponents was Representative Celler, author of a third bill, H. R. 2816, upon which the hearings were also being held (Hearings, pp. 345–351). It is significant that Representative Celler, in protesting the presence of Section 106 in S. 716 and H. R. 2379, did not extend his objections to exclusion orders. He stated that an alien just coming into this country is not within the four squares of the Constitution and has no right to go into the courts except on a writ of habeas corpus, and he indicated his willingness to leave that situation alone, although he thought some sort of administrative review should be made available (Hearings, p. 349).

Mr. Wasserman, one of the present counsel for respondent, appeared on behalf of the American Bar Association to protest exempting the Immigration and Naturalization Service from the provisions of the Administrative Procedure Act (Hearings, pp. 526–535). Although advocating that Section 10 of the Procedure Act (*infra*, App. A, pp. 63–65) apply to both exclusion and deportation (Hearings, p. 528),

[9] Referred to as "Hearings".

he recognized a distinction between the two proceedings and indicated that habeas corpus should remain the method of court review in an exclusion proceeding, but without the restraint Section 106 placed on the existing scope of review on habeas corpus (Hearings, p. 530).

Apparently as a result of such objections, Section 106 was omitted from the successor bills introduced in the Second Session of the 82d Congress (S. 2550 and H. R. 5678). The only explanation of the omission appears in the Senate report accompanying S. 2550, which explicitly states that the omission was not intended "to expand judicial review in immigration cases beyond that under existing law" (S. Rep. 1137, 82d Cong., 2d Sess., p. 28).[10] S. 2550 and H. R. 5678 went to floors of the Senate and House providing that the decision of a special inquiry officer in an exclusion proceeding should be final unless reversed on appeal to the Attorney General, the same provision which was ultimately enacted as Section 236 (c) of the 1952 Act.

2. During the course of the House debate on H. R. 5678, Representative Meader introduced amendments

[10] As to deportation (but not as to exclusion), there was some doubt as to what was meant by "existing law", since the Third, Sixth, and District of Columbia Circuits had previously held that deportation orders were reviewable, even under the 1917 Act, by declaratory judgment action. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C. A. D. C.); *Prince* v. *Commissioner*, 185 F. 2d 578 (C. A. 6). This was one basis of the decision of the court below in *Rubinstein* v. *Brownell*, 206 F. 2d 449, 545, fn. 16 (C. A. D. C.), that deportation orders under the 1952 Act were reviewable by declaratory action.

to then Section 242 dealing with deportation (98 Cong. Rec. 4414, 4415). One amendment would have deleted the provision of Section 242 (b) that the Attorney General's decision in deportation cases shall be "final" and would have provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction."[11] Representative Walter, in charge of the bill, opposed the amendment as unnecessary (98 Cong. Rec. 4414, 4415–4416) and replied as follows to Representative Meader's statement that aliens who have established a home here should have their rights determined by a court instead of an immigration official:

> * * * The gentleman seems to be concerned lest the right to a writ of habeas corpus be affected. I refer the gentleman to the Constitution of the United States, and I am sure if he looks at it again he will find that he need have no fear on that score, because a writ cannot be denied.
>
> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. * * * [98 Cong. Rec. 4415–4416.]

It was this (and similar) language, used by Representative Walter in speaking of the deportation feature of the Act, which this Court in *Shaughnessy* v. *Pedreiro*, 349 U. S. at 52, viewed as indicating that the 1952 Act gave a right to judicial review of

[11] The Meader Amendment was defeated (98 Cong. Rec. 4416).

deportation orders under Section 10 of the Administrative Procedure Act. Representative Meader was not however proposing a change as to the finality provision of the *exclusion* section of the bill, 236 (c). Therefore, Representative Walter's remarks as to the applicability of Section 10 of the Administrative Procedure Act clearly do not apply to exclusion proceedings.

That Representative Walter did not mean that the full review provisions of Section 10 of the Administrative Procedure Act applied to exclusion proceedings is brought forth forcefully by a further statement he made on the floor of the House during the debate on the Meader Amendment and by a letter he wrote on May 6, 1952, during the floor discussion of his bill, to the *Washington Post*. On the floor of the House, Representative Walter stated, in answer to a query as to whether the American Bar Association had withdrawn any objection which they had originally voiced to the bill, that he had not heard from them officially, and did not know whether they officially endorsed the views expressed by their representative, but that:

> * * * actually he even pointed out the inability to have judicial review in cases of exclusion. Where aliens have never set foot in the United States they are treated differently, but even they, under this bill, have a right to a review of the decision excluding them and later an appeal to the Attorney General, who will set up the kind of machinery that is now set up under the Act. [98 Cong. Rec., 4416.]

This specific reference to the limitation on review of exclusion proceedings clears up any ambiguity as to

the meaning of Representative Walter's general statement—in a context referring exclusively to deportation—that "Section 10 of the Administrative Procedures Act is applicable."

Representative Walter's letter to the *Washington Post*, which had been critical of the bill as being unfair to aliens being deported, stated generally that it did not bar judicial review and made all immigration proceedings subject to the provisions of the Administrative Procedure Act (98 Cong. Rec. 4836). Then he added:

> In addition to that, even in exclusion proceedings, which affect aliens who have never set foot on our soil, the right of a writ of habeas corpus has in no way been affected by my bill, as it couldn't have been affected under our Constitution.

Here again, a general statement as to the applicability of the Administrative Procedure Act to the bill is limited specifically in regard to exclusion proceedings. Thus, in spite of general words on the floor of the House and in his letter to the *Post* that the Administrative Procedure Act was applicable to the bill, Representative Walter's specific language in regard to the limited review available to the excluded alien makes clear that he did not regard exclusion proceedings as reviewable under Section 10 of the Administrative Procedure Act or otherwise than through habeas corpus.

3. Three amendments designed to make the Administrative Procedure Act applicable to exclusion and expulsion of aliens were offered and rejected in the Senate. Senator Lehman offered an amendment in

the nature of a substitute bill which provided in Section 8 that "* * * The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens * * *" (98 Cong. Rec. 5428). Senator Moody proposed an amendment making the Board of Immigration Appeals a statutory body and concluding with the stipulation that "* * * Except in the case of proceedings under section 235 (c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. 5778). Senator McCarran, in charge of the bill in the Senate, arose in opposition to this amendment and specifically stated as a basis for his objection that the amendment would provide general judicial review of exclusion orders (98 Cong. Rec. 5778). Senator McCarran's later assurance to Senator Moody that the Administrative Procedure Act was made applicable to the bill (98 Cong. Rec. 5778) must be read in the light of his previous objection to providing general review of exclusion orders.

Senator Morse offered an amendment which caused Senator McCarran to be even more specific in his objection to having exclusion orders covered by general judicial review provisions. Senator Morse's amendment provided that "* * * every person aggrieved by an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus * * *" (98 Cong. Rec. 5781). In

opposition to this amendment, Senator McCarran said (98 Cong. Rec. 5789):

> Mr. President, the particular evil of the amendment offered by the Senator from Oregon lies in the fact that it upsets a principle of law which has been unchallenged by any nation within the memory of man.
>
> The amendment would accomplish this by granting a right of review to "every person aggrieved by an adverse order in exclusion" proceedings.
>
> The grant of a right of review implies that there is a basic, justiciable, underlying right to be litigated. But, Mr. President, no alien has ever had a right to enter the United States. No alien to any country has ever had a right to enter that country. No country on earth today gives non-nationals any legal, moral, or equitable right, any justiciable right at all, to cross its borders as immigrants. But this amendment would have the United States grant such a right, by necessary implication of the language of the amendment with respect to review of exclusion proceedings, to any and every person anywhere in the world who may at any time in the future desire to come to the United States as an immigrant.
>
> From time immemorial, a sovereign nation has had the absolute right to admit or exclude aliens. If we take the step of waiving that right for this Nation, the next step is likely to be a demand that the adjudication of the alleged right of an alien to come to the United States to be vested in an international tribunal set up by the United Nations.

> * * * To adopt this amendment would be to overturn, to the detriment of the United States, one of the basic principles of international law and national sovereignty. I urge that the amendment be defeated.

This quotation makes clear the stand of Senator McCarran that exclusion proceedings would not be reviewable judicially under the general review provisions of Section 10 of the Administrative Procedure Act.[12] At another point, Senator McCarran agreed with Senator Ferguson that habeas corpus would remain available (98 Cong. Rec. 5779).

The general terms of the Conference Report, H. Rep. 2096, 82d Cong., 2d Sess., throw little light on the subject of the form of judicial review of an exclusion order. The report briefly states at p. 127:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administra-

[12] Senator Murray, a co-sponsor in 1952 of another immigration bill (S. 2842) and opposed to S. 2550 (the McCarran bill), inserted in the Congressional record a written statement that his bill "* * * would make applicable the Administrative Procedure Act to deportation proceedings" (98 Cong. Rec. 5173-5174). His failure to include exclusion proceedings in this statement shows that his opposition to the 1952 Act was directed to lack of judicial review for deportation orders, and not to exclusion rulings.

The Senate debate is replete with references to review of immigration decisions by way of habeas corpus. See, e. g., 98 Cong. Rec. 5113, 5154-5155, 5165, 5180, 5212, 5243, 5315, 5316, 5418, 5420-5421, 5434, 5604, 5778, 5781.

> tive Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

This general statement must be read against the background, noted *supra*, pp. 25–27, that the several ancestor bills, introduced as late as the first session of the same Congress, all contained a provision which would have drastically curtailed the traditional scope of habeas corpus review. The first sentence of the Conference Committee's remarks means only that consideration had been given to problems of judicial review under the bill and that the procedures adopted remain, in general, within the overall framework and model of the Administrative Procedure Act. But there were departures to meet special features in the immigration process. See *Marcello* v. *Bonds*, 349 U. S. 302, 309 (see also, *supra*, pp. 19–21). The reference in the second sentence to the "safeguard of judicial procedure" meant, insofar as exclusion was concerned, the procedure of habeas corpus which all agreed was the court remedy in exclusion cases. The Report does not say that the "judicial procedure" shall be the same in exclusion as in deportation.

Section 236 (c), as debated in both the House and Senate, was unchanged by the Conference Committee and was enacted in its original form. The excerpts from the legislative annals of the Act which we have cited (*supra*, pp. 29–30, 31–33) conclusively show that Senator McCarran and Representative Walter, the co-sponsors—as well as some of the bill's opponents—considered the language of finality in Section 236 (c) to apply to judicial as well as administrative review, as it always had in the past, and that habeas corpus

would continue to be the only mode of judicial review available for the excluded alien. Unlike deportation, there were no suggestions that declaratory remedies would now be open to excluded aliens. The emphasis was all the other way.

II. DIFFERENT CONSTITUTIONAL, HISTORICAL, AND PRACTICAL CONSIDERATIONS GOVERN EXCLUSION AND DEPORTATION ORDERS, AND THESE DIFFERENCES SUPPORT THE VIEW THAT EXCLUSION ORDERS ARE NOT SUBJECT TO JUDICIAL REVIEW EXCEPT BY HABEAS CORPUS

A. AN ALIEN SEEKING ADMISSION INTO THE UNITED STATES IS IN A VERY DIFFERENT CONSTITUTIONAL POSITION FROM THAT OF THE RESIDENT ALIEN WHOM THE GOVERNMENT IS SEEKING TO DEPORT

The difference between the constitutional position of an alien who is seeking admission to this country and that of a resident alien whom the United States seeks to deport has frequently been recognized by the courts. *Shaughnessy* v. *Mezei*, 345 U. S. 206, 212; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596; *Bridges* v. *Wixon*, 326 U. S. 135, 161; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547–548; *Han-Lee Mao* v. *Brownell*, 207 F. 2d 142, 146 (C. A. D. C.); *Ex parte Domingo Corpus*, 6 F. 2d 336 (W. D. Wash.). This difference in the constitutional rights of the two classes of aliens was succinctly summarized in *Shaughnessy* v. *Mezei*, 345 U. S. 206, at 212:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. * * * But an alien on the threshold of initial entry stands on a dif-

> ferent footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[13]

And Mr. Justice Murphy pointed out the basis of this distinction in his concurring opinion in *Bridges* v. *Wixon*, 326 U. S. at 161:

> * * * The power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. *Chinese Exclusion Case*, 130 U. S. 581. Since an alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. *Turner* v. *Williams*, 194 U. S. 279. The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. * * *

In *Knauff* v. *Shaughnessy*, 338 U. S. 537, 544, it was held that an alien could be excluded without a hearing, since whatever procedure Congress provided was due process as far as the alien denied entry was concerned. In *Shaughnessy* v. *Mezei*, 345 U. S. 206, the holding was that an alien permanently excluded from this country on security grounds, and not accept-

[13] Citing *Knauff* v. *Shaughnessy*, 338 U. S. 537, 544, and *Ekiu* v. *United States*, 142 U. S. 651, 660.

able to any other country, could be held on Ellis Island indefinitely without a hearing. A resident alien ordered deported cannot, under the Constitution, be so summarily handled. He is entitled to a hearing as a part of procedural due process under the Constitution. See *Wong Yong Sung* v. *McGrath*, 339 U. S. 33, 49–51; *Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86, 100–101.

In the Immigration and Nationality Act of 1952, Congress has given legislative recognition to this constitutional distinction between deportation and exclusion. As noted above, *supra* pp. 19–20, the burden of proof is different in the two types of cases. Also, in its provisions relating to deportation the Act specifically sets out certain procedures to assure the resident alien his measure of due process: in Section 242 (a) and (c) judicial review is specifically authorized of any determination of the Attorney General concerning detention, release on bond, or parole, pending final decision of deportability and effectuation of deportation, upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with reasonable dispatch; Section 242 (b) (1) (*infra*, App. A, p. 60) requires that notice of the charges and of the time and place of the proceedings be given; Section 242 (b) (2) (*infra*, App. A, p. 60) specifies the right to counsel of the alien's choice; Section 242 (b) (3) (*infra*, App. A, pp. 60–61) affords reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine government witnesses; Section 242 (b) (4) (*infra*, App. A, p. 61) stipulates that no

decision of deportability shall be valid unless based upon reasonable, substantial and probative evidence. See *Marcello* v. *Bonds*, 349 U. S. 302, 307–309. None of these safeguards is provided in those sections of the 1952 Act dealing with the exclusion of aliens. Conversely, the 1952 Act does expressly deny a hearing to an excluded alien in certain classes if the Attorney General finds the exclusion order is based upon information of a confidential nature (Section 235 (c), *infra*, App. A, pp. 56–57)—something it did not, and probably can not, deny in the case of an alien ordered deported.

Although the right of general judicial review of administrative orders is not inevitably a part of due process, this Court has recognized that the Administrative Procedure Act reflects a hospitable attitude toward that right. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51. Hence, as to resident aliens, who in deportation proceedings are entitled to full procedural due process, there is reason, where the statutory language is felt not to be clear, to consider as applicable to such proceedings the generally accepted standards of administrative action and judicial review. Compare *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, with *Marcello* v. *Bonds*, 349 U. S. 302. There is, however, no such reason for this attitude with respect to alien exclusion procedures which, as noted above, have never had the constitutional status of deportation hearings. In view of the difference in the constitutional status of entering aliens from that of resident aliens, it is reasonable to interpret

the different wording of the finality clause as to each type of proceeding (see *supra*, pp. 14–15) to reach a different result as to the nature of judicial review. Since the entering alien does not have the constitutional rights of a resident alien, and since he has the burden of proof in exclusion cases, there is less reason for full-scale judicial review in exclusion than in deportation proceedings.

B. THESE CONSTITUTIONAL DIFFERENCES HAVE RESULTED IN A DIFFERENT HISTORICAL DEVELOPMENT AS TO THE SCOPE OF JUDICIAL REVIEW IN EXCLUSION AND IN DEPORTATION

As already pointed out, *supra*, pp. 16–18, this Court early held that the scope of judicial review in exclusion proceedings is extremely narrow. *Ekiu* v. *United States*, 142 U. S. 651, 659–660; *Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86, 98–100,[14] and it has consistently adhered to that position. *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543.

The history of judicial review of deportation orders is different. Although the early cases spoke of deporting aliens, resident in this country, and excluding aliens, who had not yet entered the country, in much the same terms (see *Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86; *Pearson* v. *Williams*, 202 U. S. 281), historically there has been a

[14] Even as to citizenship-claimants outside the country, the decision of executive officers, to whom Congress has traditionally entrusted the task of screening aliens seeking admission into this country, has not been considered subject to judicial review unless there has been a denial of a fair hearing, an abuse of authority, or an illegal act. *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 358; see also: *Ng Fung Ho* v. *White*, 259 U. S. 276, 282; *Tang Tun* v. *Edsell*, 223 U. S. 673, 675; *Chin Yow* v. *United States*, 208 U. S. 8, 11; and *United States* v. *Ju Toy*, 198 U. S. 253, 263.

tendency, in actual practice, to treat more carefully the alien domiciled here with our consent and to accord to him a broader scope of judicial review. This is in line with the view, noted above, that the alien who is admitted to this country and has set up a domicile here is within the general protection of the Constitution, whereas the alien knocking at the door is not. It is much harsher to expel an alien, who has been permitted to set up a home in this country than to deny him entry in the first place. Thus, in *Vajtauer* v. *Commissioner,* 273 U. S. 103, 112–113, the Court considered, in a habeas corpus proceeding attacking a deportation order, whether answers to questions put to the alien might have tended to incriminate him in violation of the Fifth Amendment. In *Bridges* v. *Wixon,* 326 U. S. 135, 153–154, the Court, in a habeas corpus proceeding challenging a deportation order, applied, for the first time, the hearsay rule to deportation proceedings. In so doing the Court noted that the traditional rule against the use of hearsay evidence was relaxed in alien exclusion cases, but noted a difference when dealing with aliens whose roots have become fixed here. In *Galvan* v. *Press,* 347 U. S. 522, 528–529, a deportation case based upon membership in the Communist Party, a ground for deportation under the Internal Security Act of 1950, 64 Stat. 987, 1006, the Court reviewed the sufficiency of the evidence to support the order, on a petition for a writ of habeas corpus. The difference between the standard of review used in exclusion and deportation cases was pointed out in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 543:

> * * * Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to *exclude* a given alien. * * * [Emphasis added.]

For this reason, the holding of this Court in *Shaughnessy* v. *Pedreiro* that Section 10 of the Administrative Procedure Act *infra*, App. A, pp. 63–65) applied to deportation orders, even if Section 10 (e) (5) (*infra*, App. A, p. 65) with its standard of "substantial evidence" governed, made no real change in the scope of judicial review of deportation orders. Section 242 (b) (4) of the Immigration and Nationality Act of 1952 (*infra*, App. A, p. 61) itself provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." There is no comparable provision as to exclusion in the 1952 Act. To apply the standard of substantial evidence of the Administrative Procedure Act to exclusion proceedings would be a novel departure from a long established Congressional and judicial policy. Such a departure should not be attributed to Congress in the absence of unmistakable language commanding it. Congress has, in the 1952 Act, given no indication that it intended such a change. On the contrary, as pointed out above, it has carried over into the 1952 Act a provision placing the burden of proof on the alien and a "finality" clause which has consistently been held for many years, to preclude all judicial review except the very narrow review available through habeas corpus.

C. NONE OF THE PRACTICAL REASONS WHICH FAVOR A HOSPITABLE ATTITUDE TOWARD DECLARATORY JUDGMENT REVIEW OF DEPORTATION ORDERS APPLIES TO EXCLUSION

This Court in *Shaughnessy* v. *Pedreiro*, 349 U. S. at 51, found that it would not be in keeping with either the 1952 Immigration and Nationality Act or the Administrative Procedure Act to require a resident alien to interrupt his normal course of life, by submitting to custody, in order to seek judicial review. That reasoning does not apply to aliens seeking admission. Such persons have ordinarily no established ties, no normal course of life in the United States. If they come to this country seeking entry, they are initially taken into custody at the port before they can commence their residence.[15] They must either be kept in detention until their claims to admission are determined, or allowed in the United States on parole,[16] with the knowledge that they cannot really establish any orderly manner of living until their claims are determined. Fairness to the United States, to the alien himself and to the transportation

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[15] Respondent, in his Brief in Opposition, p. 12, alludes to a problem not in this case—the judicial review available to an alien attempting entry at our land borders. The short answer is that such an alien can also submit himself to custody and obtain judicial review by the use of the services of a writ of habeas corpus. The Commissioner of Immigration and Naturalization has determined that aliens excluded from admission at any land border port who desire to test their exclusion will be taken into the custody of the Immigration and Naturalization Service, so that a habeas corpus proceeding may be instituted.

[16] Respondent has been granted parole under 8 C. F. R. § 212.9 and Section 212 (d) 5 of the 1952 Act.

lines which brought him [11] requires that issues as to admissibility be determined with the greatest possible dispatch.

Habeas corpus is a far more expeditious remedy than a declaratory judgment action, for a number of reasons. While the eight year delay since the order of exclusion in this case may not be typical, delays of several years through ordinary judicial review proceedings are not uncommon. If an issue of fact requiring a trial is presented, crowded court calendars in the districts of important ports of entry or the District of Columbia usually result in prolonged delay, even if no dilatory tactics are attempted. Such delay in the determination of an issue as to whether an alien ought to be in the United States at all tends to frustrate the whole purpose of the exclusion procedure.

It is significant that the report of the commission appointed by former President Truman to study the immigration laws, which was in many respects critical of the 1952 Act, recommended that no change be made in what it conceived to be the then existing law, that "habeas corpus will continue to be the appropriate remedy open to an alien excluded at a port of entry who wishes to challenge a final order of exclusion" (*Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) p. 170). The recent recommendations by the

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[11] The transportation line may be liable for maintenance expenses incurred while the applicant for entry is detained. Section 233 of the Immigration and Nationality Act of 1952, 66 Stat. at 197, 8 U. S. C. (1952 ed.) 1223.

President for changes in the 1952 Act would, while regulating procedure, keep declaratory relief for review of deportation orders, but would make explicit that all exclusion orders are subject to review only by habeas corpus.[18]

There is no reason why an excluded alien should seek review in any district other than the port of entry, and at the port there is no reason why he should not be held to the expeditious and complete remedy specifically designed to test the validity of detention—the writ of habeas corpus.

III. RESPONDENT DOES NOT PRESENT A QUESTION OF STATUS REVIEWABLE BY DECLARATORY JUDGMENT

Respondent has suggested (Br. in Opp., pp. 6–7, 13) that, irrespective of the general reviewability of orders of exclusion, his case presents a question of status which may be adjudicated in an independent action for a declaratory judgment. He relies upon the principle of such cases as *Perkins* v. *Elg*, 307 U. S. 325, where a person within the United States was held entitled to bring a declaratory judgment action to determine the effect on her citizenship of the acquisition of foreign nationality by her parents during her minority; *McGrath* v. *Kristensen*, 340 U. S. 162, involving the issue of eligibility to citizenship where exemption from military service had been claimed by an alien admitted as a temporary visitor and stranded here during World War II; and on the possible implications of *Rasmussen* v. *Brownell*, 350

[18] Bills to such effect were introduced February 8, 1956, S. 3169 and H. R. 9182, 84th Cong., 2d Sess.

U. S. 806, also involving an alien within the United States who contended that, as a matter of law, his claim of exemption from service did not debar him because the country of his nationality was not in fact neutral.

This contention fails for several reasons. The issue of respondent's right to bring a declaratory judgment was in effect adjudicated against him in the prior proceeding before this Court; the question which he raises does not concern his legal position, but simply whether he is *in fact* the son of his claimed father; and such an issue is not the type of status question as to which the Court has held that a declaratory judgment action would lie, even as to persons within the United States; and, finally, the legislative history of the 1952 Act makes clear that as to all persons outside the United States the only review Congress permitted is that available in habeas corpus where the claimant is actually at the gates seeking entry.

A. THIS COURT'S PREVIOUS DISMISSAL OF RESPONDENT'S DECLARATORY JUDGMENT ACTION FOR LACK OF JURISDICTION (340 U. S. 906) IN EFFECT DETERMINED THAT A STATUS QUESTION OF THE TYPE REVIEWABLE BY SUIT FOR DECLARATORY RELIEF WAS NOT PRESENTED BY THIS CASE

The effect of the proceedings in respondent's prior case as an adjudication that he presents no issue of status, independently reviewable by declaratory judgment action, can best be understood in the light of the state of judicial decision at the time.

In *McGrath* v. *Kristensen*, 340 U. S. 162, the Court had held that, where an alien ordered deported sought to contest a ruling that he was ineligible for citizenship on the basis that, as a matter of law, his applica-

tion for exemption from military service was not a bar to citizenship, there was presented an issue of status which was reviewable by declaratory judgment action. Although the Court of Appeals had taken the broad position that orders of deportation generally were reviewable in declaratory judgment suits (179 F. 2d 796), this Court did not reach that question. It said, 340 U. S. at 169:

> Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under § 19 (c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a prescribed status by this administrative ruling of ineligibility. Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U. S. C. § 1331, and the terms of the Declaratory Judgment, 28 U. S. C. § 2201.

The Court pointed out the narrow application of its decision, 340 U. S. at 171:

> * * * So here a determination that Kristensen is not barred from citizenship by § 3 (a) of

> the Selective Training and Service Act of 1940 only declares that he has such status as entitles him to consideration under § 19 (c) of the Immigration Act, * * *

Subsequently, the Court held in *Heikkila* v. *Barber*, 345 U. S. 229, 236–237, that under the 1917 Act orders of deportation not involving this type of status issue could be reviewed only in habeas corpus. It made the distinction between that type of case and *Kristensen* as follows:

> Heikkila suggests that *Perkins* v. *Elg*, 307 U. S. 325 (1939) (declaratory and injunctive relief), and *McGrath* v. *Kristensen*, 340 U. S. 162 (1950) (declaratory relief), were deviations from this rule. But neither of those cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho* v. *White*, 259 U. S. 276. And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under the special provisions of § 19 (c) of the 1917 Immigration Act, as amended, 8 U. S. C. § 155 (c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within *Elg* or *Kristensen*.

Respondent's prior declaratory judgment action was filed before *Heikkila* but after this Court's decision in *Kristensen*. On his original complaint for a

declaratory judgment, requesting the District Court to find that he was the blood son of a citizen who served in World War II and was therefore admissible under the War Brides Act, the District Court assumed that it had jurisdiction to consider the complaint on the merits under the authority of *McGrath* v. *Kristensen* and it found that respondent had not established the blood tie. 103 F. Supp. 507. By the time the appeal was decided, however, the *Heikkila* decision had been handed down, with its distinction between a status question and ordinary review of an order of deportation. The Court of Appeals affirmed the ruling that respondent had not proved the relationship, but expressed doubt that jurisdiction existed at all, because of this Court's opinion in *Heikkila*. 207 F. 2d 132 (C. A. D. C.). In petitioning for certiorari to this Court, respondent did not suggest that an issue of status under *Kristensen* was involved; rather, he urged this Court to reverse the decisions below because of lack of jurisdiction, on the authority of *Heikkila* v. *Barber* (petition for certiorari in *Tom We Shung* v. *Brownell*, No. 241, O. T. 1953, p. 5).

This Court remanded the cause for dismissal of the complaint, on the ground of lack of jurisdiction, on the authority of the previous *Heikkila* decision. 346 U. S. 906. Since respondent's first complaint had been heard on the merits in the District Court, this disposition of the cause was a square holding that there was no independent basis for jurisdiction under *Kristensen* on the theory that an issue of status was involved.

Nothing in the subsequent case of *Rasmussen* v. *Brownell*, 350 U. S. 806, detracts from the force of that ruling. That case, like *Kristensen*, involved a legal question of eligibility for citizenship, and consequently eligibility for suspension of deportation, although the action took the form of an attack on an outstanding deportation order. Because a deportation order was involved, the Court of Appeals, on the authority of *Heikkila*, held that the District Court had been without jurisdiction. 221 F. 2d 541 (C. A. D. C.). On petition for certiorari to this Court, Rasmussen urged that, under both *Heikkila* and *Kristensen*, eligibility for American citizenship was an issue which could be the subject of a declaratory judgment action (see petition for certiorari in *Rasmussen* v. *Brownell*, No. 733, O. T. 1954, pp. 3–5). The government, although it noted that *Heikkila* did suggest that the *Kristensen* rule would be confined to cases which did not involve an outstanding deportation order, did not unequivocally oppose the petition for certiorari. Memorandum for Respondent in *Rasmussen* v. *Brownell*, No. 733, O. T. 1954, pages 4–6. The government recognized that the issue was one of status and suggested in its Memorandum (p. 6):

> The Government has no desire, however, to delay unnecessarily a decision on the basic issue in this case. If this Court is of the view that jurisdiction exists under the *Kristensen* decision, because the underlying issue is one of status, then we suggest that the petition for a writ of certiorari should be granted and the cause remanded to the Court of Appeals for consideration on the merits.

This Court, in *per curiam* opinion, granted the petition, reversed the judgment, and remanded the case to the Court of Appeals for consideration on the merits. 350 U. S. 806.

The full import of the *Rasmussen* decision is not clear, since no explanatory written opinion accompanied it.[19] But whatever its holding, it does not aid respondent here. Taken in its most favorable light on the status issue, *Rasmussen* is merely a holding that, even though there was an outstanding deportation order normally reviewable only by habeas corpus, where the issue presented was the status of eligibility-to-citizenship (which would have supported a declaratory judgment action before issuance of the deportation order), it could be raised by declaratory judgment after the order. *Rasmussen* does not lessen the effect of the prior ruling in this case as a determination that there was no status issue which would support an independent action.

B. IRRESPECTIVE OF THE PRIOR ADJUDICATION, THE ISSUE IN RESPONDENT'S CASE IS NOT ONE OF STATUS WHICH WOULD INDEPENDENTLY SUPPORT AN ACTION FOR DECLARATORY JUDGMENT

As an initial matter, it is evident that respondent does not raise the type of status question which has been held reviewable by declaratory judgment action.

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[19] The Court had previously decided in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, that under the 1952 Act orders of deportation were reviewable in declaratory judgment actions. The decision in *Rasmussen* could also have been based on the theory that such review applied to pre-1952 orders as well, as the Court of Appeals for the District of Columbia subsequently held. *Muscardin* v. *Brownell*, 227 F. 2d 31.

We do not deny that respondent has, in one sense, a "status," just as every other alien being excluded or deported has. For instance, an alien being excluded on the grounds of feeble-mindedness under Section 212 (a) (1) of the 1952 Act has a declared "status" of being feeble-minded, and is therefore inadmissible to this country. And the alien being excluded as an anarchist under Section 212 (a) (28) (A) has a declared "status" of being an anarchist, and is therefore inadmissible. So respondent has the "status" of not being the son of an American citizen and thus not admissible under the War Brides Act. That, however, is not the kind of issue of status to which the decisions refer.

The leading cases on declaratory judgment as to status all involve (a) a general issue of citizenship or eligibility to citizenship, and (b) a determination of the legal question of the right of a class as a whole, rather than the factual question of whether the particular individual belonged in fact to that class. Thus, in *Perkins* v. *Elg*, 307 U. S. 325, the issue was the effect on the citizenship of a minor child of the acquisition of foreign nationality by her parents during her minority—a general question of law relating to nationality. In *Rasmussen*, the issue was whether a citizen of Denmark was a citizen of a "neutral country" under the provisions of Section 3 (a) of the Selective Training and Service Act, so that an application for draft exemption resulted in a disqualification for citizenship under that section. In *Kristensen*, the question was whether a citizen of another

country caught here by the exigency of World War II was "residing" in this country so that Section 3 (a) of the Selective Training and Service Act applied to him and disqualified him from citizenship.[20]

As the term "status" was dealt with in *Elg, Rasmussen,* and *Kristensen,* respondent does not raise any issue of status since he is not claiming citizenship or eligibility to citizenship; moreover, even if "status" be used more broadly to refer to any class, respondent's "status" is clear—he is an alien admissible to this country under the War Brides Act by proving the fact of his filial relationship to an American citizen who served in World War II. What he seeks is not a determination of his status, but a review of the evidence as to whether he is a person who has such status. This type of determination of factual issues is precisely the kind which, under the cases discussed *supra,* pp. 35–36, 39, has been held to be, particularly as to exclusion, the prerogative of the executive subject to the narrowist form of judicial review. *Knauff* v. *Shaughnessy,* 338 U. S. 537, 543; *Fok Yung Yo* v.

[20] If respondent were correct in broadening "status" questions to include the membership of a particular alien in some "class" or other, almost all immigration cases would fall into the enlarged category. For instance, *Heikkila* v. *Barber,* 345 U. S. 229, which held habeas corpus the exclusive remedy for an alien ordered deported under the 1917 Immigration Act, should have been decided the other way under respondent's present theory. The substantive issue there was whether the Communist-membership provisions of the immigration law were valid, and this could well be stated as an issue of "status" (in respondent's sense):—Did Heikkila belong to the class of aliens-deportable-because-of-membership-in-the-Communist-Party?

United States, 185 U. S. 296, 304–305; *Ekiu* v. *United States,* 142 U. S. 651, 659–660.

C. AS TO PERSONS OUTSIDE THE UNITED STATES WHO HAVE NEVER BEEN ADMITTED TO, OR RESIDENT WITHIN, THE UNITED STATES, DECLARATORY REVIEW IS NOT AVAILABLE EVEN THOUGH A TRUE ISSUE OF STATUS MAY BE INVOLVED

The cases discussed above (*Perkins* v. *Elg,* 307 U. S. 325; *McGrath* v. *Kristensen,* 340 U. S. 162; and *Rasmussen* v. *Brownell,* 350 U. S. 806) all involved persons who were residing in the United States, as citizens or aliens. The holdings of these cases, even if otherwise applicable, cannot be assumed automatically to apply to excluded persons, particularly excluded aliens who do not reside here.

This Court early recognized a distinction, even as to citizens, between those who resided here and those who had never been in this country. *Ng Fung Ho* v. *White,* 259 U. S. 276, 282. As to citizens resident here, it was held that they were entitled to a judicial determination of the issue of citizenship (*Ng Fung Ho* v. *White,* 259 U. S. at 284–285), but as to citizenship-claimants who had never been in the United States it was held that they were not entitled under the Constitution to a full judicial hearing. *United States* v. *Ju Toy,* 198 U. S. 253, 262–263; *Chin Yow* v. *United States,* 208 U. S. 8, 10–13; *Tang Tun* v. *Edsell,* 223 U. S. 673, 675. This difference was eliminated for a time by Section 503 of the Nationality Act of 1940, 54 Stat. 1137, in which Congress conferred a right to bring a *de novo* declaratory judgment action upon anyone claiming United States nationality who had been denied a right or privilege on the ground that

he was not such a national. Dissatisfaction with what was deemed an abuse of that right by persons claiming citizenship who had never been in the United States led Congress partially to reinstate the older distinction in Section 360 of the 1952 Act.[21] As noted, *supra*, p. 21, Section 360 of the 1952 Act provides that even persons claiming citizenship, who are excluded on the ground that citizenship is not established, may have the determination reviewed only by habeas corpus.

If that is true of a determination relating to the status of citizenship, it is all the more true of an issue presented by a conceded alien which is said to be a "status" question. As we have shown, *supra*, pp. 24–35, the legislative history of the 1952 Act strongly indicates that the only court review of any exclusion order which Congress contemplated was that available through the traditional writ of habeas corpus. Since a citizenship question is relegated to judicial determination by habeas corpus in the 1952 Act when the issue arises in an exclusion proceeding, it would seem, *a fortiori*, that a question of "status" of kinship-to-a-citizen, when the issue arises in an exclusion proceeding, was also intended to be confined to review by habeas corpus.

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[21] The joint hearings held on the McCarran-Walter bill (which became the 1952 Act) indicate that the concern was with "the fraud and derivative citizenship cases", and the fact that aliens not entitled to admission were gaining physical entry into the United States through Section 503 of the 1940 Act and then disappearing into the general populace. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess., on S. 716, H. R. 2379, and H. R. 2816, p. 443. See also, Senate Report No. 1515, 81st Cong., 2nd Sess., p. 777.

In sum, respondent does not present any underlying issue which would take his case out of what we believe to be the required holding that orders of exclusion may be judicially reviewed only in habeas corpus.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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APPENDIX A

STATUTES INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. (1952 ed.) 1101 *et seq.*, are Sections 235, 236, 242, 291 and 360 (a).

1. Section 235 of the Act, 66 Stat. at 198, 8 U. S. C. (1952 ed.) 1225, provides in pertinent part:

INSPECTION BY IMMIGRATION OFFICERS

SEC. 235. * * * (b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 273 (d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

(c) Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraph (27), (28), or (29) of section 212 (a) shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the

Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

2. Section 236 of the Act, 66 Stat. at 200, 8 U. S. C. 1226, provides:

EXCLUSIONS OF ALIENS

SEC. 236. (a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Pro-

ceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287 (b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 235 (c). From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 235 (c) such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) If a medical officer or civil surgeon or board of medical officers has certified under

section 234 that an alien is afflicted with a disease specified in section 212 (a) (6), or with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1), (2), (3), (4), or (5) of section 212 (a), the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer. If an alien is excluded by a special inquiry officer because of the existence of a physical disease, defect, or disability, other than one specified in section 212 (a) (6), the alien may appeal from the excluding decision in accordance with subsection (b) of this section, and the provisions of section 213 may be invoked.

3. Section 242 of the Act, 66 Stat. at 208, 8 U. S. C. 1252, provides in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

SEC. 242. * * * (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section,

and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to

cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. * * *

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. * * *

* * * * * *

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a), who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, * * * shall upon conviction be guilty of a felony * * *.

* * * * * *

4. Section 291 of the Act, 66 Stat. at 234, 8 U. S. C. 1361, provides:

BURDEN OF PROOF

SEC. 291. Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, quota immigrant, or nonquota immigrant status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this Act. In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

5. Section 360 (a) of the Act, 66 Stat. at 273, 8 U. S. C. 1503 (a), provides in pertinent part:

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL

SEC. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. * * *

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. (1952 ed.) 1001, are Sections 10 and 12.

1. Section 10 of the Act, 60 Stat. 243, 5 U. S. C. (1952 ed.) 1009, provides in pertinent part:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy

thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

2. Section 12 of the Act, 60 Stat. 244, 5 U. S. C. (1952 ed.) 1011, provides in pertinent part:

> * * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. * * *

APPENDIX B

Opinion of the Court of Appeals in Estevez *v.* Brownell

United States Court of Appeals for the District of Columbia Circuit

No. 12417

Jose Bernardo Estevez, appellant

v.

Herbert Brownell, Jr., Attorney General of the United States, appellee

Appeal from the United States District Court for the District of Columbia

Decided October 13, 1955

Before Edgerton, Wilbur K. Miller, and Fahy, Circuit Judges

Edgerton, *Circuit Judge:* Appellant's complaint, filed in 1954, says he is a native and citizen of Honduras, last arrived in the United States in 1953, and was ordered excluded under § 212 (a) (22) of the Immigration and Nationality Act of 1952, 66 Stat. 184, 8 U. S. C. § 1182 (a) (22), on the ground that he had previously left the United States to avoid military service. He contends that the necessary intent was not shown and that the exclusion proceedings were defective in other respects. He asks that these pro-

ceedings be declared void. The District Court dismissed his complaint, on the ground that the court had no jurisdiction because an order of exclusion cannot be reviewed except by habeas corpus. We think the court erred.

If appellant were attacking a deportation order instead of an exclusion order, his right to the review he seeks would be clear. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48. We think the principle of that case extends to this one.[1] The pertinent provisions of the 1952 Act in respect to deportation and in respect to exclusion are substantially similar. Section 242 (b) says: "In any case in which an alien is ordered deported * * * the decision of the Attorney General shall be final * * *." 66 Stat. 210, 8 U. S. C. § 1252 (b). Section 236 (c) says: "where an alien is excluded from admission * * * the decision of a special inquiry officer shall be final unless reversed by the Attorney General." 66 Stat. 200, 8 U. S. C. § 1226 (c).

It is irrelevant that with regard to a "person who has been issued a certificate of identity under the provisions of subsection (b)" and is "in possession thereof", § 360 (c) of the Act provides that a "final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." 66 Stat. 173, 274, 8 U. S. C. § 1503 (c). Appellant is not "any such person". It does not appear that he "has been issued", or has applied for, a certificate of identity under the provisions of subsection (b). It

[1] Although the exclusion case of *Tom We Shung* v. *Brownell*, 346 U. S. 906, involved the 1917 Act, and the present case involves the 1952 Act, it is perhaps significant that in *Tom We Shung* the Supreme Court relied solely on *Heikkila*, a deportation case.

appears that he is not entitled to one, for only certain classes of persons who claim to be nationals of the United States are entitled to certificates, and appellant says he is a citizen of Honduras.[2] Section 360 (a) of the 1952 Act, 66 Stat. 273, 8 U. S. C. § 1503 (a), likewise has no application here. It applies only to persons "within the United States" who claim "a right or privilege as a national of the United States."

[2] In *Rubinstein* v. *Brownell*, 92 U. S. App. D. C. 328, 331, 206 F. 2d 449, 452, a deportation case, we had no occasion to point out that § 360 (c) does not apply to all exclusion cases.

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